In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 576

PETER JOSEPH TROIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A6) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7) was entered on July 22, 1966. On August 18, 1966, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to September 20, 1966, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

285-307—66

QUESTIONS PRESENTED

1. Whether government agents, having probable cause to believe that an automobile contained contraband, could properly search and seize it.

2. Whether the trial court abused its discretion in refusing to grant a continuance to permit the defendant to transcribe a tape recording.

STATUTES INVOLVED

Section 781 of Title 49 provides in pertinent part:

> (a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.
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> (b) As used in this section, the term "contraband article" means—
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> * * * * *
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> (3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation or other security.

Section 782 of Title 49 provides in pertinent part:

> Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited * * *.

STATEMENT

An indictment filed in the United States District Court for the Eastern District of Pennsylvania charged petitioner with knowingly possessing about one million forged and counterfeit four-cent United States postage stamps with intent to use and sell them in violation of 18 U.S.C. 501 (R. 3).[1] He waived trial by jury. He was found guilty and on October 5, 1965, was sentenced to imprisonment for five years under 18 U.S.C. 4208(b) (R. 172). The court of appeals affirmed the conviction.

On October 9, 1961, petitioner and two associates, Joseph Costello and Vincent Noce, came to Philadelphia from New York. Petitioner traveled in a Pontiac automobile which Costello had borrowed from a friend. The others traveled in another automobile. The Pontiac contained about a million dollars in counterfeit stamps. Petitioner parked it near a Philadelphia hotel (R. 38–42, 83) and in the hotel he and his associates attempted to sell stamps to government agents who posed as buyers (R. 43–48). Later, petitioner and Noce remained in one hotel room while Costello went to another room where he negotiated with the pretended purchaser (R. 47, 72–73). One of the agents was given the keys to the Pontiac to enable

[1] The "R." references are to the Appendix for Appellant in the court of appeals.

him to inspect the stamps (R. 49–50, 83, 138–139).

On a motion to suppress evidence it was shown that the government agent who had been given the keys to the car first examined the stamps on the street at about 11 p.m.[2] He drove the Pontiac to the custom house, where government agents conducted a further examination of the stamps. The automobile was then driven back to a place near the hotel and two cars were parked bumper-to-bumper against it so that it could not be moved (R. 12–13, 28, 84–85). Petitioner's arrest occurred at about 3:45 a.m. when he left the hotel and entered the automobile (R. 15). Petitioner contended that the stamps were inadmissible in evidence against him because they had been seized before his arrest.

ARGUMENT

1. The agents had authority to seize the automobile for forfeiture under 49 U.S.C. 782 as soon as they had probable cause to believe that it was being used to transport counterfeit money. Thus, even before the agent was given the keys to the car in order to enable him to examine the stamps, seizure could properly have been effected. *United States* v. *Haith*, 297 F. 2d 65 (C.A. 4), certiorari denied, 369 U.S. 804; *Drummond* v. *United States*, 350 F. 2d 983, 988 (C.A. 8), certiorari denied *sub nom. Castaldi* v. *United States*, 384 U.S. 944; *Burge* v. *United States*, 342 F. 2d 408, 414 (C.A. 9), certiorari denied, 382 U.S. 829; *Sirimarco* v. *United States*, 315 F. 2d 699, 701 (C.A.

[2] Petitioner conceded that the agents could have lawfully seized the car at this time (R. 32).

10), certiorari denied, 374 U.S. 807. The delivery of the keys as part of the criminal scheme merely facilitated the seizure, and the lawful seizure did not become invalid because the agents replaced the stamps in the automobile, returned the car to the vicinity of the hotel, and waited for a driver to appear. Such action violated no rights of petitioner. A legal seizure of the vehicle had already been made; the vehicle had become the property of the United States by forfeiture after the agents positively determined that the stamps were counterfeit.

2. When petitioner and his two companions, Costello and Noce, came to the Philadelphia hotel, they went to a room on the third floor, where they met two other men, Blaney and Martin. While petitioner and Noce remained in the third floor room, Costello and Blaney negotiated for the sale of the stamps with two government undercover agents in a room on the twelfth floor. The negotiations in that room were secretly monitored and recorded on a tape recorder. At the hearing on the motion to suppress, which immediately preceded the commencement of the trial, the fact of monitoring and recording was disclosed (R. 8–9, 21).

At the trial, after Costello had testified on cross-examination that he did not know how the stamps were printed (R. 97), defense counsel offered a portion of the tape recording of his conversation with the agents (R. 98–99). When the judge found the tape unintelligible, defense counsel said that she had been able to take quite lengthy notes (R. 99) and asked for an adjournment so that the whole tape

could be transcribed (R. 100). The court suggested that counsel had demonstrated that she could cross-examine Costello on the basis of her notes, but counsel replied that she wanted to offer the tape as direct evidence (R. 106) and stated that she thought she could get a transcript made in about a week (R. 107). The court ruled that counsel could cross-examine the witness and, if Costello denied any of the statements, play that portion of the tape which contained the statements (R. 108). The court also said that thereafter it would permit the defense to go forward with all portions of its case except the tape and would adjourn the trial to permit the tape to be transcribed (R. 108). However, after Costello had been cross-examined on the basis of the tapes (R. 110–132), and after the defense had put on its case by calling only the agent who was present at the twelfth floor conference,[3] the court declined to adjourn the trial (R. 159–160). The court allowed in evidence the portions of the tape used to attack Costello's credibility (R. 161).

There is no substance to petitioner's complaint that a stenographic transcription of the tapes was necessary in order to prove that "petitioner's involvement was one of innocence" and to show "motive on the part of Costello and Noce" (Pet. 10–11). Noce did not even participate in the conversations that were recorded, and as far as Costello was concerned petitioner was able to use the intelligible

[3] Defense counsel brought out from this witness that the stamps were packed in a manner described by Costello in the conversation (R. 139).

portions of the tapes to cross-examine him as to his knowledge of the stamps in the car. The fact that prior to the trip to Philadelphia Costello might have known that "the merchandise" being transported was counterfeit stamps (R. 43, 55), as petitioner sought to demonstrate, does not show that petitioner was innocent. The district court had indicated its willingness to adjourn the case if the tapes proved to be significant. When, however, it became clear from the defense case that petitioner was seeking merely to reiterate its impeachment of Costello, the judge properly exercised his discretion in declining to grant an adjournment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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